Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

—*v.*—

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1978
CERTIORARI GRANTED JANUARY 8, 1979

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE
COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—*vs.*—

DAVID SANDSTROM, DEFENDANT

RELEVANT DOCKET ENTRIES

December 3, 1976

Refusal and Waiver of Preliminary Examination filed.
Bail fixed at $100,000.00 filed.
Information filed.

December 8, 1976

This being time set for entry of plea, let the records show the Defendant is present in Court with his counsel Byron Boggs. At this time Mr. Boggs informed the Court that his client enters a plea of "Not Guilty" and also handed the Court a Notice of Purpose to Rely on the Defense of Mental Disease and Defect excluding responsibility. Defendant is remanded to the custody of the Sheriff until further order of this Court and until counsel for the Defendant has a chance to review the matter further.

December 15, 1976

Motion for psychiatric examination of Defendant filed.

December 22, 1976

Order for psychiatric examination of the Defendant filed.

February 18, 1977

Affidavit filed.

March 18, 1977

Defendant's Motion for Entry of Judgment of Acquittal on the Grounds of Mental Disease or Defect Excluding Responsibility filed.

July 18, 1977

This is the time set for Jury Trial. Defendant is present in Court with his attorney Byron Boggs. The State is represented by County Attorney John Radonich and Deputy County Attorney Joseph Connors. The matter is to be heard before the Honorable Robert J. Boyd.

July 21, 1977

Counsel stipulated all jurors present. Court in session. The Judge read the Instructions to the jurors. Connors makes his summation. Boggs makes his summation. Radonich concluded. The Jury deliberated at 11:15. The Jurors returned to the Courtroom at 2:25 o'clock. Robert Buhl—Jury foreman gave the verdict to the Bailiff which he presented to the Judge, then to the Clerk to be read. The Verdict—Deliberate Homicide. Sentencing July 25, 1977, Monday at 10:00 o'clock A.M. Court adjourned at 2:30. Defendant remanded to the custody of the Sheriff.

July 25, 1977

Verdict—Deliberate Homicide filed.

July 26, 1977

Commitment to State Penitentiary filed.

August 12, 1977

Notice of Appeal filed.

June 30, 1978

Remittitur and copy of opinion filed.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE
COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

INFORMATION—Filed Dec. 3, 1976

COMES NOW Joseph C. Connors, Deer Lodge County Attorney, as attorney for the State of Montana, after the Defendant, David Sandstrom, having waived and refused a preliminary examination in Justice Court and Justice of the Peace, John M. Sajcich, having bound the defendant over to District Court for further proceedings, and, therefore, the undersigned accuses David Sandstrom with the crime of Deliberate Homicide, a felony, in violation of Section 94-5-102, committed in Deer Lodge County, Montana, as follows:

On or about November 1, 1976, in Deer Lodge County, Montana, the defendant, David Sandstrom, purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife, which was in violation of the above statute and against the peace and dignity of the State of Montana.

The maximum sentence for said offense is imprisonment in the State Prison for any term not to exceed one hundred (100) years.

December 2, 1976.

/s/ Joseph C. Connors
Deer Lodge County Attorney
Attorney for the State of Montana

OFFICIAL TRANSCRIPT OF ARRAIGNMENT

No. 2877

Filed Dec. 8, 1976

STATE

v.

DAVID SANDSTROM

JACK SCANLON DEPUTY COUNTY ATTORNEY appearing for the State.

BYRON BOGGS, PUBLIC DEFENDER, appearing for the Defendant.

BE IT REMEMBERED that the above matter came on for Hearing before the HON. ROBERT J. BOYD, Judge, on the 8th of December, 1976, in the Deer Lodge County Courthouse.

THE COURT: Let the record show that the Defendant, David Sandstrom, appeared before this Court on the 3rd day of December, 1976, answered to his true name and at the request of counsel additional time was granted for entry of plea. Are you prepared to enter a plea at this time?

MR. BOGGS: At this time, Your Honor, the Defendant would like to enter a plea of not guilty and I would hand the Court a Notice of purpose to rely on the defense of Mental Disease or Defect Excluding Responsibility.

THE COURT: Is counsel going to make a Motion for Evaluation or do it privately?

MR. BOGGS: I would like to review that matter for a little additional period before I decide which way to go on that.

THE COURT: The Defendant is remanded to the custody of the Sheriff of Deer Lodge County until further Order of the Court.

(Hearing concluded.)

THAT PORTION OF PETITIONER'S ATTORNEY'S OPENING REMARKS WHEREIN HE INFORMED THE COURT AND JURY OF HIS INTENT TO CONTEST THE PROOF ON THE ELEMENT OF PURPOSE OR KNOWLEDGE. [Official Transcript pages 204 line 13 through 207 line 25].

THE COURT: The Defendant may make his opening statement.

MR. BOGGS: Thank you. Ladies and gentlemen of the jury, I ask for your complete attention because I believe it is very important that you understand the posture that the defense will take in this case.

It may be somewhat different than the impressions you have gotten if you read the newspaper account and I think it needs to be thoroughly explained to you.

As was stated by Mr. Connors, there was a confession in this case. The Defendant David Sandstrom will not repeat that confession. He admits the facts that are stated in that confession. And in that confession it is stated that he took the life of Annie Jessen. It is further stated that he sexually abused Mrs. Jessen after her death. These facts will be admitted too. The issue that will be presented to you upon those facts is the question of what crime is constituted from the facts. The charge is deliberate homicide in that David Sandstrom took Mrs. Jessen's live knowingly or purposely. It is the position of the defense based on the facts and the facts that will primarily inform you as to the events of that night—it will be stated in the confession there were circumstantial evidence as stated by Mr. Connors that will corroborate the truthfulness of the confession.

I do not know and I do not expect that there will be any evidence, presented to you which will contradict the confession in any respect. Based on those facts it will be the defense posture that the element of the crime of deliberate homicide, that the Defendant David Sandstrom acted knowingly or purposely is not true.

As was discussed with you when you were being chosen as jurors I did file in this case a notice of intent to rely on the defense of mental defect or disease. I believe

it will be the testimony of the witnesses, the professional psychologist, and psychiatrist that I will ask to take the stand, that David Sandstrom does not suffer any mental disease or defect that will excuse him for the conduct at that time. And, therefore, I would not ask you to find that he be excused of this conduct on that basis, but as I told you during the voir dire the initial plea, and the plea remains, in this case is the plea of not guilty and understand that with that plea the State must prove every element of the crime beyond a reasonable doubt, and that the element of the crime we do not believe can be proved is the element of knowingly or purposely doing the act.

The facts that we will rely on for this defense will be, as I say, primarily those of the confession and specifically that on the night in question David Sandstrom was drunk. Now, the degree of drunkenness no one will be able to know, but you will have to judge that from the testimony here. Beyond that the professional mental health people, who as I will call, will testify as to their opinion as to his health state at that time. They will state that their opinion based on their understanding of his personality that he does not plan, that he is a borderline retarded person, that acting under the influence of alcohol and possibly drunk he took the life of Mrs. Jessen and impulsively without thinking acted under the influence of a situation that he simply could not comprehend in the sense that he deliberated and comprehended in our situations. There will be asked of you by the prosecution to find an additional fact in this case and that is that the Defendant took the life of Mrs. Jessen pursuant to a plan of lying in wait. I do not believe the facts in this case will warrant such a conclusion.

I listened to Mr. Connors as he described the facts, I did not see in those facts such a plan of lying in wait, and I do not believe that you will find them in the confession as it is stated and there is no other evidence that I am aware of that contradicts this in any way to such an opinion.

I will ask the Court not to submit that question to you because I do not believe there will be any facts to

base such an opinion. If the question is submitted to you it will be the defense posture that it is not a fact. As we said during the selection of the jury I expect this case to arouse your emotions perhaps as strongly as they can be aroused. I also expect that you will put these emotions aside and apply the law that will be given to you by the Court to the facts as you will hear them and I will ask of you at that time to look at the consequences and return a verdict of not guilty of deliberate homicide requested by the prosecutor but a verdict of mitigated homicide based on the position that the Defendant did not act with knowledge or purpose in taking Mrs. Jessen's life. Thank you.

STATE'S EXHIBIT 16

PETITIONER'S CONFESSION

DATE: 11-22-76
TIME: 11:34 A.M.

IN REFERENCE TO ANN JESSEN CASE

This statement was given to Terry Wilkinson, Detective, Anaconda Police Department, by me, David Sandstrom, of my own free will, with no coercion or threats of any kind.

On October 31, 1976, I was home giving out candy to the trickie-treaters. This was at about 7:00 P.M. I kept giving out candy until 11:30 P.M. or 12:00 Midnight. I left and went down town. I was walking around, looking for a place to drink. Terry Hayes and Gary Rettinger drove up and asked me if I wanted to go and ride around. I went with them. They gave me a can of beer. We were riding around and I asked them if they wanted to go to Butte. They said "yes".

We then went up to the Circle K and got some gas, and I bought two six packs of beer. We left for Butte and drove around over there for awhile. Our first stop was Harrington's Bar. Myself and Gary went in and played some foos ball and had a beer. Then we left and went down to the Dry Gulch Bar. We all went in the bar, but couldn't get served because Hayes never had an I.D.

We left there and rode around and ended up at Charlie's New Deal. I went in the bar by myself. I met Rick Cole, Mariann Petra there. We had a few beers there. I went out and got Terry and Gary and bought them in. They never had anything to drink.

They were telling us to leave the bar because of closing hours. I brought a case of beer and a pint of whiskey (Kesslers). A bunch of us left the bar and went up to Joe Sisner's sister's house to have a party. It was around 3:00 A.M., November 1, 1976, when we started to run out of beer. Myself and Terry Hayes, Gary Rettinger,

Mariann Petra went down to the M-M Bar and got another case of beer. We went back up to the house where the party was going on. We were drinking up there again. We were getting short of beer and we went down to the M-M bar and got two more six packs of beer. This was around 4:00 A.M., November 1, 1976.

We drove around for a few minutes and went up to Mariann Petra's sister's house, where she was staying then.

Myself, Terry Hayes, Gary Rettinger took Mariann Petra home. It was around 4:30 A.M. at this time and we started back home. We had some beer left, and I had a few cans on the way home.

We came into town, and dropped Gary Rettinger at his house. Then we, Terry and I, were going west to take me home. We got by the Safeway and I told him to drop me off on the corner.

I walked up Larch Street and up the alley to the end and took a right and walked towards Ogden Street.

I went towards the creek and sat down for a few minutes. I started to think about robbing someplace and I thought about the Jessen place. So I got up and walked across the bridge and up the road. I walked around the house to see if anyone was there. The kitchen light was on. I thought no one was there. There was a shovel next to the house and I threw it through the window. I ran over by the chicken house and hid for a little bit. I then went back to the house, and no one was around. I pulled some glass out of the window sill and crawled through the window. I was looking through the house. I was in the bedroom off the kitchen. I was in there looking around and she came out. She didn't see me. She went over to the broken window and was asking, "Who's there?" I came out and went over and grabbed her and she started to scream.

I got worried that someone would hear her, so I picked up the shovel and hit her with it. I hit her in the back of the head. I thought it would stop her from screaming, but it never. I couldn't understand what she was screaming about.

She started to wheel her wheel chair and I got scared and didn't know what to do. There was a knife laying up on the counter, so I grabbed that and stabbed her. I stabbed her in the back five times. The knife went through the back of the wheel chair. She quit moving around and there was blood all over the place. I pulled her out of the wheel chair. Her skirt or whatever ripped.

I tried dragging her into the next room, but the skirt kept ripping, so I left her. I went into her bedroom and looked through a few of the drawers. I went in the closet and found a rifle, a .22, and took it out. I looked at it and just threw it on the bed. I was really drunk, having a hard time walking.

I went out in the kitchen and didn't realize what I was doing when I raped her. I don't remember going into the bathroom. When I finally came to my senses and realized what I was doing, I went to get up and slipped. This is when her leg got broken. I got up and went out the door and left. I took the knife with me. I never took anything else from the house. When I got down to the bridge, I threw the knife in the creek, then I went home. I got home around 6:00 A.M. or a little after.

My dad was up and my mom got up. They asked me where I was and I said I was at a party. I then went to bed.

The first time I hit her with the shovel she was facing the bedroom off the kitchen. She never stopped screaming. I took the knife off the counter and kind of grabbed her the same time. I started to stab her and pulling her back towards the sink—all in one motion.

I declare that the above statement is made to the aforesaid person, Terry Wilkinson, of my own free will without promise or threat, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

/s/ David Sandstrom—11-23-76

Witness:

/s/ Terry Wilkinson—11-23-76

TESTIMONY OFFERED IN PETITIONER'S DEFENSE BY A PSYCHOLOGIST AND PSYCHIATRIST CONTESTING THE ELEMENT OF PURPOSE OR KNOWLEDGE. [Official Transcript pages 293 line 9 through 328 line 14].

DR. WILLIAM STRATFORD

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOGGS:

Q. Please state your name.
A. My name is William Stratford.
Q. And you are a doctor of psychiatry, isn't that true?
A. I am a medical doctor and specialize in the practice of psychiatry.
Q. Would you tell us Dr. Stratford what your education and training has been to achieve that status?
A. Certainly. I had premedical education at the University of Utah. I attended medical school at the University of Tennessee in Memphis. Did a rotating medical internship with a hospital associated with the University of Utah Medical Center. Then did a three-year general psychiatric residency at the University of Utah Medical Center and a four-year fellowship in child psychiatry at the same facility before going into private practice.
Q. And what is your present practice?
A. My present practice is in Missoula, Montana, and consists of approximately 30 to 40 percent forensic or legal cases, another 30 to 40 percent of adult—both in and out patients and 15 to 20 percent child psychiatry.
Q. Now, when you say forensic cases that refers to criminal?
A. Right.
Q. And in that connection that is with the Montana State Prison?
A. Partly, I am consulting psychiatrist with the Montana State Prison for the last—over the last two years examining inmates there. That is a part of my private practice, I examine criminals for various attorneys and courts.

Q. Approximately how many cases were you asked to examine persons in regards to criminal cases?
A. Well, considering civil as well as criminal cases, I have testified in courts of law over 1,200 times.
Q. Now, you were ordered to conduct an examination of the Defendant David Sandstrom, were you not?
A. Yes, I was.
Q. And did you make such an examination, isn't that true?
A. Yes, sir.
Q. I would like for you to describe to the jury the results of that examination of Mr. Sandstrom as far as it pertains to his intelligence and personality factors.
A. Certainly. I had an occasion to examine Mr. Sandstrom on January 24th of this year here in Aanaconda. I talked to him about the circumstances of the crime. I had an occasion to talk to Mr. Sandstrom about his past experiences, education, prior behavior in lots of different areas. And I administered to him what a psychiatrist refers to as a mental status examination, which is a detail checklist—sort of a way of checking a person's intelligence. They are emotional makeups ascertaining certain traits about an individual, trying to tell whether or not the person is in fact psychotic and trying also to assess their intelligence.

As a result of my examination of Mr. Sandstrom I was able to formulate, and did write a letter to the Court which did indicate that Mr. Sandstrom has an I.Q. that is somewhat less than normal, but that he is not defective in terms of his intelligence.

In my opinion he is not now psychotic nor was he at the time of the crime, he is not suffering from mental disease in my opinion. In my opinion what he does suffer from is a long-term personality disturbance, which is characterized by the impulsive aggressiveness, a sense of immediacy. He is encumbered by an inordinate amount of conscience—he does not particularly feel guilty about

his behavior and will engage in that behavior, particularly —readily under the influence of any chemical intoxicant such as alcohol.

Q. Doctor, when you stated that he had a less than normal intelligence, is that—is it possible to estimate the intelligence in terms of the familiar I.Q.?

A. Certainly. His I.Q. was 79.

Q. And how does that relate to a normal I.Q.?

A. Normal I.Q. is 90 to 110.

Q. And how would that relate—relate to an I.Q. with a mental defect?

A. In my opinion an I.Q. that would constitute a mental defect is an I.Q. of 69 or below.

Q. Now, Doctor, you were describing the personality of David Sandstrom and you stated that he was not actually defective, I think that is the exact word you used, but the impression you have is impulsive?

A. Yes, sir. Would you like me to explain that?

Q. Yes, would you try to explain that.

A. Certainly. Many times people engage in activity and they will plant it or give some thought to the consequences of their behavior. Impulsive refers to the lack of that planning. It is in essence the immediacy or jumping to the event or the circumstances in an impulsive way without the planning or forethought and with no concern for the consequences that often times people do possess.

Q. Now, reading from the letter that you—that you wrote earlier to the Court—

MR. RADONICH: Which I am going to object as hearsay.

MR. BOGGS: I will phrase it as a question.

MR. RADONICH: I will withdraw the objection.

BY MR. BOGGS:

Q. Would you say that Mr. Sandstrom's personality shows a lack of planning?

A. Characteristically, yes. Characteristically in my opinion he is an impulsive individual who does not spend a large amount of time in planning for the future or planning to—in terms of current events, nor does he have the capacity generally to follow through with planning such as a—for example a job or education, he lacks

the ability to stick to a task and complete it, generally speaking.

Q. Now, would you say that Mr. Sandstrom suffers a personality disorder?

A. Yes, I would.

Q. But it is not a psychosis?

A. That is right, it is not a psychosis, it is not a mental disease and not a mental defect, it is a personality disorder.

Q. Now, would you say that this personality disorder could reach a severe degree if under the influence of alcohol?

A. Yes, whatever personality trait Mr. Sandstrom does exhibit would be worsened under the influence of alcohol, which I think is—would be a common experience of anyone here if reflecting upon whom they have known and who have been sober at one point and drinking at another point, they could see generally in their behavior —it would worsen Mr. Sandstrom's traits.

Q. Now, I think you have already stated your opinion on this for us, but for clarification, for the benefit of the jury, I will ask you—you are familiar with meaning of the term mental disease or defect that is the opinion in the Montana Criminal Code, is that true?

A. Yes.

Q. What is your opinion as to whether or not David Sandstrom suffers from a mental disease or defect in the meaning of those terms?

A. My opinion—he does not suffer from a mental disease or defect within the context of those terms.

Q. Now, you are aware of the facts that constituted the death of Mrs. Jessen, are you not?

A. Yes, sir.

Q. And have you read the confession of David Sandstrom in this case?

A. Yes.

Q. I will ask you was there anything in your examination that caused you to doubt the facts stated in the confession?

A. No.

Q. Well then, I would ask you to assume those facts for the purpose of this question. And I would ask you

do you have an opinion as to whether David Sandstrom deliberated on the death of Mrs. Jessen?

MR. CONNORS: Objection, Your Honor, that is not a point of law which the Defendant is charged. The deliberation is not the test.

MR. BOGGS: Your Honor, the comment to the section under which Mr. Sandstrom is charge states that the section relates only to conduct that is done deliberately.

THE COURT: Overruled.

BY MR. BOGGS:

Q. Do you understand the question, Doctor?

A. I understand the question, I am not sure of the context when you are using the word deliberation. If you use it in the sense that it was planned, I don't think that it was planned to cause her death. If you are using the term deliberation to indicate that he perhaps purposely inflicted damage upon her in the deliberate sense, using the word in that context, I think that is true, he did deliberately do that. He did deliberately harm her.

Q. Do you believe that he formed the intention to take her life?

MR. RADONICH: We object, that invades the province of the jury, what his intention was.

THE COURT: Overruled.

THE WITNESS: Would you rephrase that, sir.

BY MR. BOGGS:

Q. Well, I would not rephrase it. The question is—

THE COURT: Have the reporter read it back then, counsel.

(Whereupon last question read back by reporter.)

THE WITNESS: In my opinion his intention was to silence Mrs. Jessen.

BY MR. BOGGS:

Q. Then, you are thinking of the facts stated in the confession that Mrs. Jessen was screaming, do you recall that from the confession?

A. Yes.

Q. And you believe his intention was to stop her from screaming?

A. Yes.

Q. Now, it has been suggested by the prosecution in this case that the death of Mrs. Jessen was pursuant to a plan of David Sandstrom to lie in wait for Mrs. Jessen. Now, do you have an opinion whether in fact there was any such plan to lie in wait?

MR. CONNORS: Objection, your Honor. That invades the province of the jury.

THE COURT: Sustained.

BY MR. BOGGS:

Q. Doctor, do you have an opinion as to the mental state of Mr. Sandstrom at the time that he took Mrs. Jessen's life?

A. Yes, I do.

Q. I would ask you to describe that to the jury as well as you can.

A. Okay. In my opinion that evening Mr. Sandstrom had been drinking with friends. He had some degree of alcohol in his system, which as I indicated would exasperate his basic traits, which I have also indicated.

In my opinion at the time of the murder he was really—it could be a correlation of factors. There are several factors. One is Mr. Sandstrom was somewhat limited in intelligence and that may have contributed to the fact that he perceived limited or fewer options than an average person. In addition he was intoxicated to some degree. Thirdly, he does have the basic personality characteristics that I have indicated of impulsiveness and impressions.

And I think in my opinion that when he was confronted with her presence and confronted with the screaming that his intention was at that point to silence Mrs. Jessen and when he was unable to do so with the shovel, pursued the course of events.

Q. Thank you, Doctor. Now, you are aware, are you not, of the facts stated in the confession and it's likewise been demonstrated here that Mrs. Jessen was sexually violated?

A. Yes.

Q. Were you able to determine from your examination of Mr. Sandstrom if he suffers sexual perversion, derangement in that regard?

A. In my opinion he—although he is certainly questionable—from the facts here of his past history he does not.

Q. You were able to discover none?

A. Well, Mr. Sandstrom was reluctant to discuss that aspect of the case about Mrs. Jessen, particularly, but he was less reluctant in terms of his background.

In my opinion as far as I know he has no past history of sexual abhorrent behavior.

Q. Well, do you have an opinion as to how that event—well, I will withdraw that.

MR. BOGGS: I don't have any other questions at this time, your Honor.

THE COURT: You may cross-examine for the State.

MR. CONNORS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. CONNORS:

Q. Dr. Stratford, with regard to mental defect, that relates mainly to I.Q. of a person?

A. Yes.

Q. So, clearly David Sandstrom comes at least ten points above where you would draw the line for a person to be mentally defective?

A. That is true.

Q. How would you describe a mental disease?

A. In my opinion, from a medical point of view, mental disease is a psychosis, a psychosis either induced by some physiological problem that a person may have. I am referring to something like D.T. or psychosis which happens to people where they lose perspective and context with reality and they often have to be hospitalized suffering from hallucinations where they might hear voices or see things or be convinced that there is a conspiracy to destroy them, for example.

And these examples are within the province of mental disease from the medical point of view.

Q. Essentially a total falling out with reality?

A. Yes.

Q. Now, we have talked about characteristics, disorders or personality disorders or antisocial conduct, are all of these terms—are we talking about the same general area separate and apart from a psychosis?

A. Yes, we are. There is a continuum from the normal through the neurotic people, which generally have anxiety, to what is referred to as a personality or character disorder within this construction that Mr. Sandstrom falls, and it can be further defined within that as to what type of a personality disorder an individual does have. And it is my opinion that it is an antisocial or sociopathic personality disorder. Perhaps that explains it.

Q. And so it is clear an antisocial or personality disorder is not a mental disease?

A. That is true, it is not a psychosis, it is not a mental disease.

Q. Would Mr. Sandstrom be able to function in society, say in a common laborer's job, truck driving job, a job that would not require say a college education?

A. Given his personality or given his I.Q. or both.

Q. Well, start with the I.Q.

A. Given his I.Q. Mr. Sandstrom would be employable, and would be able to function within society.

Q. It may take longer to train him?

A. Right, he would not be as quick—he would not be as quick about picking up things, he would not have a tremendous capacity for abstract thought, but there are a lot of people functioning in society who have I.Q.'s which are similar to Mr. Sandstrom's.

Q. All right. How about his antisocial characteristics?

A. I separated that in my response to you and an antisocial person—in terms of the personality disorder is generally—has a very poor outlook, they are often running aloof of the law. They have a lot of difficulties with drugs and alcohol, they have a lot of difficulties with family maintenance, the maintenance—relationship with their children, maintaining employment. It is generally a very—is a particularly long-term picture.

Q. Now, Doctor, at the time you examined Mr. Sandstrom was he able to express to you the events of November 1, 1976, involving the homicide of Annie Jessen?

A. Yes, he was.

Q. Could he recall the facts and circumstances rather clearly?

A. Yes, he could.

Q. And you have read the complete confession of David Sandstrom?

A. Yes.

Q. In your opinion did he have the sufficient mental capacity at that time to be conscious of what he was doing?

A. At that time in my opinion he had the capacity to be aware of what he was doing.

Q. Was he aware of the facts and circumstances at that time?

A. I think he was aware of where he was, he was aware that Mrs. Jessen was screaming. I believe that he was aware of the fact that he hit her with the shovel. I believe that he was aware that he picked up a knife and I believe he was aware of the fact that he stabbed her with that knife.

Q. Therefore, would you say that he had the capacity to knowingly cause the death of Annie Jessen by stabbing her with the knife?

A. Yes, in my opinion he had the capacity to know that by stabbing her that there was a high probability he was going to cause serious injury to that woman.

Q. At the time of this crime did he have the capacity to purposely and consciously be aware of picking up the knife and actually inflicting the stab wounds to Annie Jessen?

A. In my opinion, yes. In my opinion he purposely hit her with the shovel first and he purposely picked up the knife and he purposely inflicted the stab wounds on Mrs. Jessen.

Q. Now, the terminology brought out in the questioning by defense counsel used the word deliberate and you distinguished between planning in advance, did you mean

before he went into the house that in your opinion he didn't have a plan to cause the death of Annie Jessen?

A. In my opinion that is true. Before he went in the house, in my opinion, it was not his intention or plan or deliberation to cause the death of Mrs. Jessen.

Q. And at what point in time or under what circumstances do you think in your opinion that he formed the purpose or had the knowledge to cause this act?

A. In my opinion it was at that point when he became aware that he was not alone in the house and he became aware by seeing Mrs. Jessen visually and he was aware of her screaming that at that point he purposely, in my opinion, began to inflict this series of events upon her.

MR. CONNORS: No further questions, your Honor.

THE COURT: Redirect?

MR. BOGGS: I would like redirect, your Honor.

REDIRECT EXAMINATION

BY MR. BOGGS:

Q. Doctor, in response to the question by Mr. Connors you stated that you believed that David Sandstrom had the capacity to purposely take the life of Mrs. Jessen, is that right?

A. I believe so.

Q. Do you have an opinion—I believe, however, is it not in fact true that you—it was your opinion that his purpose in striking her with the shovel and his purpose in stabbing her with the knife was to stop her from screaming?

A. Yes, sir.

Q. Do you think he formed the intent and purpose of taking her life?

A. In my opinion he did—he did not intend to kill her, but that he was aware of the fact—he had the capacity to be aware of the fact that the instruments that he utilized were capable of causing her death.

Q. Do you think he was aware of that fact and he was—he knew he was taking her life?

A. Do I believe that he was aware that he was taking her life in the sense he knew that is what he was doing?

Q. Yes.
A. In my opinion I believe that his intent was merely to silence her, I don't think he really considered it.
Q. Would it be fair to say that this was an act, an impulsive act?
MR. CONNORS: Objection, a leading question.
THE COURT: Overruled. It's repetitious but not necessarily leading.
THE WITNESS: Yes, in my opinion it was impulsive. As I have indicated, tried to indicate, I do not think it was his purpose to kill her. Given the combination of his I.Q., his personality, the alcohol, and the immediate circumstances, I think that it was an impulsive poorly planned act.
MR. BOGGS: I don't have any other questions, your Honor.
MR. CONNORS: Your Honor, may I ask another question?
THE COURT: That is a promise, one question.

RECROSS-EXAMINATION

BY MR. CONNORS:

Q. Doctor, in your opinion did David Sandstrom have the capacity to know that stabbing Annie Jessen in the back with the knife could cause her death?
A. Yes.
MR. CONNORS: Thank you.

(Whereupon witness was excused.)

THE COURT: Counsel, call your next witness.
MR. BOGGS: Dr. Michael Nash.

DR. MICHAEL NASH

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOGGS:

Q. Please state your name.
A. My name is Michael M. Nash.

Q. And what is your occupation?
A. I am a licensed clinical psychologist.
Q. That is what you are called, is that true?
A. Yes.
Q. Where do you reside?
A. I reside in Bozeman, Montana.
Q. What has been the experience and training that has lead to your being a clinical psychologist?
A. I received my P.H.D. in psychology at the University of Montana in 1971. I received my masters in psychology at the University of California, Riverside in 1965, and my law degree of—from the University of Montana in 1967. In 1971 after graduating I went to—I did my internship with the Department of Corrections in the State of Wisconsin and completed the requirements for clinical—to be a clinical psychologist.
I then went to Florida and taught on the faculty of Florida State University in the department of clinical psychology, obtained my license in psychology in Florida, then returned to Montana in 1973 where I was the chief in clinical services at the Montana State Prison for two years and also was licensed as a psychologist in the State of Montana and subsequently went into private practice and am now consulting with the State Prison on and during the period from 1970—well, throughout graduate school and throughout my training I have been particularly involved in the area of forensic psychology, that is the area of psychology that particularly relates to legal implications of various psychological cases.
Q. Mr. Nash, approximately how many cases concerning the mental elements of criminal offenses have you dealt with?
A. I have personally testified in about 20 criminal trials.
Q. And how many have you been involved in in a diagnosis or treatment capacity?
A. Hundreds, I really couldn't keep track.
Q. Mr. Nash, you were ordered by the Court to examine the Defendant David Sandstrom, were you not?
A. That is true.

Q. And you did examine him, I believe, isn't that true?

A. Yes.

Q. I would like to have you describe to the jury what your examination of Mr. Sandstrom revealed concerning his intelligence and his personality?

A. In January of 1977, I conducted a psychological interview with Mr. Sandstrom. I just took a couple of hours, interviewed his parents for some period of time and an hour to an hour and a half to administer some further psychological tests and further interviews and I provided a report and then I saw him again in May of this year, May 1st, to further explore some particular questions which were brought up in a preliminary hearing.

I administered the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory. I used pictures and asked him to tell me a story about those pictures. I had him do some figure drawings of a man and a woman. I gave him the Word Association Test.

As a result of these tests I found that he had a Verbal intelligence quotion of 79, which is a score that indicates that he is significantly in a statistical sense—he is measurably and statistically and significantly in a lower intelligence classification than the majority of people would be in, which is known clinically as a borderline—a level of borderline range of intelligence.

The MMPI, the Minnesota Multiphasic Personality Inventory resulted in a series of scales of scores. On the series of—well, 13 scales. Three of which have to do with whether or not it is a valid test, and they indicated in fact it was a valid test. Then you interpret the other scales in terms of the relationship of one scale to another, and in this particular—in this case the scales that were elevated are those which are often associated with individuals who have a lack of impulse control, suspiciousness, antisocial feelings or at least attitudes which deviate from the majority of attitudes of the culture, a lack of consistent internal principles. In other words, the behaviors we engage in which are antisocial or wrong do not even have any particular rational purpose internally.

In other words, it is not a clear-cut dedicated—for example, to a criminal life style it is impulsive criminal acting out and some possibility of an emotional disturbance.

Further, tests then were used and interpreted to determine the extent and whether or not there was a serious emotional disturbance and the additional tests tended to indicate while he was not that, he was not a very emotional person, that he in fact repressed feelings of guilt and—but he did not approach the extent of a psychotic or an insane dimension.

The tests in general—they reflected intellectual limitation, emotional immaturity, poor impulse control and confusion. They indicated a life style which is characterized by impulsive immediate gratification of impulses, little planning for thought, excessive drinking and states of rather constant intoxication and poor social relationships.

Q. Would it be correct to say that it was your opinion that David Sandstrom had little ability to analyze either the past or the future?

MR. RADONICH: To which we would object, it is leading.

THE COURT: Sustained.

BY MR. BOGGS:

Q. Now, the I.Q. you found of 79, that was the same I.Q. that Dr. Stratford found, isn't that right?

A. Dr. Stratford and I approached the determination of the level of intelligence in slightly a different fashion. He approached it in the sense of a range of abilities and a clinical comparison with other cases he has seen in the matter, which he has been trained in. My approach is to use a test that gives you a concrete score.

Both of us—in other words we independently ended up with the same classification which is borderline intelligence from different approaches.

Q. Now, would you characterize the elements of Mr. Sandstrom's personality as you found them to be a personality disorder?

A. That was my conclusion. My opinion is that he is suffering from a personality disorder, character disorder, or rather neurotic or psychotic conditions.

Q. Would it be your opinion that his personality disorder—or let me ask you this question. What would be the effect of alcohol consumption on the elements of that personality disorder?

A. Generally it would mean paying less attention to the realities of the environment around him and greater tendencies to act impulsively, act for the immediate value, what seems to be happening, to be less rational than he would be otherwise, exercising worse judgment.

Q. As a lawyer I assume you are familiar with the aspects of Montana Criminal Code that pertains to mental disease or defect, is that true?

A. Yes, I am.

Q. Do you have an opinion as to whether or not Mr. Sandstrom suffers from a mental disease or defect within the meaning of those provisions?

A. In my professional opinion as a psychologist he does not have a mental disease or defect which would make him unable to appreciate the consequences of his conduct or enable him to conform his conduct to the rule of law.

Q. Now, you are familiar with the facts that constituted the events of the death of Annie Jessen, is that true?

A. Yes, I am.

Q. You read the confession of David Sandstrom?

A. Yes, I did.

Q. In the course of your examination of Mr. Sandstrom was anything revealed to you that caused you to doubt any of the facts stated in the confession?

A. No.

Q. Well, I would ask you to assume those facts for the purposes of the following questions.

Do you have an opinion as to whether or not David Sandstrom deliberated on the death of Mrs. Jessen?

A. Yes.

Q. And what is that opinion?

A. In my opinion he did not anticipate or plan the death of Mrs. Jessen. He was in the reacting—at the time of the offense I believe his mental condition could best be described as a condition of—a range of frustration and anger and that he was trying to prevent her from screaming and that if that had occurred at some earlier stage he may not have gone any further, but that he took increasingly more severe steps to try to stop her from screaming and then that ultimately brought her to her death.

Q. I believe it was your answer you do not believe he deliberated on her death?

A. Yes.

Q. Would you say that this was well—let me ask you this. Do you believe that David Sandstrom on the early morning of November 1st of 1976 formed the specific intention to take Mrs. Jessen's life?

MR. RADONICH: To which we object, it calls for a conclusion, it invades the province of the jury and it is not an opinion.

THE COURT: Sustained.

MR. BOGGS: I don't have any other questions, your Honor.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. RADONICH:

Q. Mr. Nash, I believe you stated that you do not think David Sandstrom deliberated, do you mean that in the same context as Dr. Stratford when he said formed a plan?

A. I have an opinion he did not form a plan.

Q. Do you equate this with the deliberate thing that counsel speaks of?

A. I believe that was the context that was advanced.

Q. I believe you characterized his problem as a personality or character disorder. What do you mean?

A. A character disorder is a distinguished neurosis or psychotic condition generally which are thought of as

being processes of the mind that causes a neurosis or psychosis. It is the process of the mind that causes an internal distress or makes them unable to cope with reality. A character disorder is a learned way of approaching the world, it is a life style, as opposed to descriptions of internal processes.

Q. It's true, is it not, in various aspects of character disorders—most people have these?

A. Everybody has a character and when one aspect of that character causes the individual difficulties in coping with society we call that a character disorder.

In other words, everybody has this to some extent or another, a touch of greed or larceny or—but when that becomes a predominant operating factor you consider this individual a thief and that is a character disorder.

Q. I believe you indicated in one of the tests you had given to him that he had a lack of impulse control, a suspiciousness, antisocial feeling, those are elements that any ordinary person could have but he would not be out of reality, is that correct?

A. Yes.

Q. And a person could have all of those but still have them in control?

A. Yes, sir.

Q. How did you find Mr. Sandstrom when you examined him in January, was he cooperative to you to an extent?

A. I found him to be complying on the surface but somewhat leery of me and somewhat reticent. I had to drag information out of him. As the examination went along that became less difficult and when I saw him in May he was substantially easier to get information from but generally at the outset there was some difficulty in really establishing rapport.

Q. Was he at that time in touch with reality?

A. Yes.

Q. Did he appear to be alert to you?

A. Yes, at that time my notes reflected he appeared to be alert and oriented to the environment, although he appeared to have kind of a limited range of concern about the world. He was focusing principally right on

his immediate condition and that is—seems to be characteristic of his life style.

Q. He has the ability to decide what course of action —and capacity to decide one course of action from another, doesn't he?

A. Yes, he does.

Q. I believe you have stated in your report that he could decide not to take an alcoholic substance?

A. He can, he has the capacity to make those decisions.

Q. So that he could stop drinking or whatever, is that correct?

A. There is no mental illness that prevents him from doing so.

Q. All right. Just referring to alcohol in general, this is a depressant, is it not?

A. Yes.

Q. And it tends to depress the emotions and feelings of people?

A. It tends to inhibit judgment.

Q. Let me rephrase that, Mr. Nash. If a person has consumed a great deal of alcohol he would be so depressed that he may pass out?

A. Yes.

Q. As contrasted to a small amount that he may take, he may just weave when he walks?

A. Yes.

Q. So that depending upon the amount that he had it would dictate how he would act, would that be correct?

A. Yes.

Q. And if he had a small amount of alcohol he would not stagger when he walked?

A. Well, these are all just on a continuous—you could be sober or drunk or very drunk, but in—yeah.

Q. But these are physical characteristics that would show if the person was sober, partly drunk or really drunk?

A. Sure.

Q. And the physical characteristics being staggering, slurring of speech, loss of thought contents?

A. One of the first things that begins to deteriorate with increasing amount of alcohol is the disruption of

equilibrium, the ability to maintain balance and the more intoxicated you get the less feedback you get from the external environment, so that the—you don't hear quite what you are saying at the same time you are saying it and you get a slurness of speech, difficulty in maintaining the upright position without assistance and so on.

Q. And a person that is progressively drinking more is getting progressively deeper in a state of these types of things?

A. Yes.

Q. Now, in regard to your testing of Mr. Sandstrom, does he have the intelligence to function in society?

A. Yes, he does.

Q. He could be a truck driver or could be a—some type of activity that may require training but would not require—he could learn these things, could he not?

A. Generally with this intelligence he would be excluded, what would be considered skilled trades and I believe truck driving would be a skilled trade.

Q. Well, if he could drive a car he could probably be taught to drive a truck, a small normal delivery truck, as contrasted to across the country truck?

A. Not across the country.

Q. Could he at the same time have similar activities of digging ditches, working as a laborer, this type of thing?

A. Yes.

Q. And could he function as that?

A. Yes, from his intellectual perspective.

Q. I am referring only to the I.Q. Now, Doctor, I would like to refer you to this handbook which is a handbook of diagnostic and statistical manual of mental disorders put out by the American Psychiatric Association and ask you to refer to page 14 where it's contained that a borderline mental retardation is an I.Q. of between 68 and 83, is this how you arrived—when you determined the 79 I.Q., is this how you arrived at a borderline mental retardation?

A. Basically, yes.

Q. Insofar as the I.Q. is concerned?

A. Yeah.

Q. Would it be fair to say then that if he had an I.Q. of 83 or above he would then be a normal person?

A. Well, he would be in a range that—in that case what we'd call normal.

Q. If it was a lower I.Q. than would be normal that would be categorized as having a personality or character disorder?

A. The term we are dealing with here with mental defect—any time we have an I.Q. of less than 83 we have an area of mental defect, above 83 even though there is a separate statistical category it is not considered a mental defect, in this case it is.

Q. Let me ask you this then, is it true that the average mean I.Q. is 100?

A. The mean I.Q. is 100.

Q. And presumably half the people are above that and half the people are below that?

A. That's right.

Q. The people then between the 83 and 100—well, the 83—excuse me. The 100, down below to zero, that would be half the people, is that correct?

A. From 100 to zero it would be half the people.

Q. Now, the people between 83 and 100 would be considered, so far as mental defect is, considered normal?

A. Yes.

Q. And then above the 100 they would be considered, I suppose, brilliant?

A. Well, above 100 and 115 they would be considered measurably—as measurably more intelligent as somebody with the less—85 I.Q. is measurably less capable. 85 percent of the total fall between the range of 85 and 115.

Q. Referring, Mr. Nash, to when David Sandstrom was in the home of Annie Jessen's residence on November 1st, what is your opinion as to whether or not he had the capacity to purposely pick up the knife?

A. In my opinion, he had the capacity to do that, to know that he was picking up the knife, to intend to pick up the knife.

Q. And did he have the capacity to know when he picked up the shovel that hitting Mrs. Jessen would harm her?

A. Yes.

Q. When he began stabbing Mrs. Jessen, did he have the capacity to know that stabbing her could result in her death?

A. I believe he had the basic capacity to do so.

Q. To know that this would be the result?

A. Yes.

MR. RADONICH: I have no further questions.

MR. BOGGS: May I reopen my direct examination, there is an area I neglected.

THE COURT: Very well.

FURTHER DIRECT EXAMINATION

BY MR. BOGGS:

Q. Mr. Nash, you recall do you not that in the confession it stated that Mr. Sandstrom sexually violated Mrs. Jessen, do you recall that?

A. Yes, I do.

Q. In your examination of Mr. Sandstrom were you able to uncover evidence of sexual perversion or disorder or anything of that kind?

A. No—

MR. RADONICH: To which we object, this has nothing to do with the sexual end, your Honor, outside the province of the case.

THE COURT: Overruled.

THE WITNESS: No, not in the sense of perversion, no.

BY MR. BOGGS:

Q. Do you have an opinion as to the mental state of David Sandstrom while he committed this act?

A. Yes, I do.

Q. What is that opinion?

MR. RADONICH: To which I object, that is outside the scope of this case, what his mental condition was after the homicide.

THE COURT: Sustained.

MR. BOGGS: Very well. May I have one question in rebuttal?

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. BOGGS:

Q. Dr. Nash, in response to a cross-examination question you believe David Sandstrom had the capacity to comprehend or know what he was doing—stabbing Mrs. Jessen and as a result taking her life. Do you have an opinion as to whether he had that knowledge in the sense of a present awareness that that is what he was doing?

A. Yes, I do.

Q. And what is your opinion?

A. In my opinion at the time the killing took place he was in a—had a condition which is described as a rage, meaning that he was less conscious of awareness of the activities that were going on. This is partly a result of his intelligence, partly a result of the fact that he had some alcohol, partly the result of the fact that he had tendencies of repressive feelings of guilt than when they are provoked to, flooding out, his anger projection and at that time that the act was going on he had a less appreciation for the logical consequences of the behavior that he was engaging in, that he would have ordinarily.

But, this did not approach a psychotic condition so therefore he had the capacity to appreciate it.

If he would have been in a psychotic condition he would have little memory of the events, but in fact he does remember them. So, psychologically the capacity was there but the likelihood or the nature of that appreciation has been somewhat reduced.

MR. BOGGS: No other questions.

MR. RADONICH: We have no further questions.

THE COURT: Thank you, Doctor, you may step down.

THE COLIQUY BETWEEN THE COURT AND PETITIONER'S ATTORNEY WITH RESPECT TO THE INSTRUCTION HERE AT ISSUE. [Official Transcript pages 332 line 12 through 333 line 6].

THE COURT: The Court proposes to give Instruction No. 5, offered by the State as No. 3.

MR. BOGGS: Your Honor, I object to that instruction. I can cite to your Honor a number of cases, I believe they are all in the Federal Court or—I believe in the Federal Court, one in the 9th Circuit Court of Appeals that have disproved the use of this instruction. The holding has been that the instruction has the effect of shifting the burden of proof on the issue of intent to the defense and that is inpermissible under the Federal Constitution, due process of law. Stating from the case of Mullaney vs. Wilbur the United States Supreme Court case, the 5th Circuit has categorically denounced and the 9th Circuit—and it was an error in a particular case in which it came out—it was not reversible but nonetheless it was an error to use the instruction.

My intern can give you those citations if you would like to see them.

THE COURT: You can give those to the Supreme Court. The objection is overruled.

INSTRUCTIONS GIVEN BY JUDGE BOYD

INSTRUCTION NO. 3

The defendant, David Sandstrom, is by information charged with the crime of deliberate homicide, a felony, in that on or about November 1, 1976, in Deer Lodge County, Montana, he purposely or knowingly caused the death of Annie Jessen by stabbing the said Annie Jessen in the back with a knife.

Before you may convict the defendant, David Sandstrom of the crime of deliberate homicide, a felony, you must be convinced beyond a reasonable doubt of the following elements of this crime:

1) That the defendant did cause the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana; and,

2) That the defendant caused the death of Annie Jessen purposely or knowingly.

INSTRUCTION NO. 4

You are instructed that the law presumes a person innocent until he is proved guilty, and this proof must be of a nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused. The mere fact that an information has been filed, charging a person with a crime, does not, in itself, raise a presumption of guilt.

The presumption of innocence has the weight and effect of evidence in the Defendant's behalf, and this should continue until it is rebutted by competent evidence which displaces any reasonable doubt you might otherwise have of the Defendant's guilt.

INSTRUCTION NO. 5

The law presumes that a person intends the ordinary consequences of his voluntary acts.

INSTRUCTION NO. 6

A Material element of every crime is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing.

INSTRUCTION NO. 7

"Knowingly" is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a

high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

INSTRUCTION NO. 8

"Purposely" is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

INSTRUCTION NO. 9

Purpose and knowledge are manifested by the circumstances connected with the offense. Purposes and knowledge need not be proved by direct evidence, but may be inferred from acts, conduct and circumstances appearing in evidence.

INSTRUCTION NO. 10

A person who is in an intoxicated condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

INSTRUCTION NO. 11

"Mitigated deliberate homicide" is defined as follows: Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

INSTRUCTION NO. 12

You are instructed that the defendant, David Sandstrom, has abandoned the defense of mental disease or

defect and you may not acquit the defendant on that basis.

INSTRUCTION NO. 13

If you are convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, but you are not convinced beyond a reasonable doubt that the defendant caused the death of Annie Jessen purposely or knowingly, then you should find the defendant guilty of mitigated deliberate homicide.

INSTRUCTION NO. 14

If you are not convinced beyond a reasonable doubt that the defendant, David Sandstrom, caused the death of Annie Jessen on November 1, 1976, in Deer Lodge County, Montana, purposely or knowingly, then you should find the defendant not guilty of deliberate homicide.

INSTRUCTION NO. 15

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reason in that regard.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

Cause No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

VERDICT—Filed July 25, 1977

Deliberate Homicide

We, the jury in the above entitled action find the defendant DAVID SANDSTROM, guilty of the crime of deliberate homicide.

Dated this 21 day of July, 1977.

/s/ Robert L. Buhl
Foreman

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

JUDGMENT—Filed July 25, 1977

After written waiver of preliminary hearing by the defendant, David Sandstrom, and Order of Justice of the Peace John Sajcich binding the defendant over to District Court for trial, a criminal Information was filed on December 2, 1976, by the County Attorney for Deer Lodge County as attorney for the State of Montana, charging the defendant with the following FELONY: Deliberate Homicide, in violation of Section 94-5-102, R.C.M. 1947, as amended, committed on or about November 1, 1976.

The Defendant was arraigned on December 2, 1976, and advised of the nature of the charges against him, of the maximum sentence after a plea or verdict of guilty, of his right to a jury trial, and of his right to counsel, either retained by the defendant or appointed by the court if the defendant was indigent.

The defendant was thereafter represented by Public Defender Byron Boggs and entered a plea of "Not Guilty" to the above criminal charge.

A trial by jury was held on July 18, 1977, and the jury returned the following verdict:

"IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

No. 2877

STATE OF MONTANA, PLAINTIFF

—vs.—

DAVID SANDSTROM, DEFENDANT

VERDICT

We, the jury in the above entitled action, find the defendant, DAVID SANDSTROM, guilty of the crime of Deliberate Homicide.

Dated this 21st day of July, 1977.

/s/ Robert L. Buhl
Foreman"

The defendant appeared in open court on July 25, 1977, and was asked if he had any legal cause to show why sentence and judgment of the court should not be imposed at that time, and the defendant replied in the negative;

NOW, THEREFORE, it is the sentence and judgment of the court as follows:

(1) The defendant shall be imprisoned in the State Prison at Deer Lodge, Montana, for a period of one hundred (100) years; that said sentence shall be served consecutively with the sentence and Judgments ordered in Deer Lodge County causes numbered 2878 and 2885 respectfully.

The defendant is hereby remanded to the custody of the Sheriff of Deer Lodge County, for transportation to the State Prison for execution of this the sentence and judgment of the court.

Dated this 25th day of July, 1977.

/s/ Robert J. Boyd
District Judge

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

July 26, A.D. 1977

Present, Hon. ROBERT J. BOYD

STATE OF MONTANA

against

DAVID SANDSTROM

Convicted of DELIBERATE HOMICIDE

JOSEPH CONNORS

The County Attorney, with the Defendant—and counsel, BYRON BOGGS came into Court. The Defendant was duly informed by the Court of the nature of the indictment found against him for the crime of DELIBERATE HOMICIDE committed on the 1st day of Nov. A.D. 1977, and of arraignment and plea on the 3rd day of DECEMBER, A.D. 1976, of "Not Guilty of ———— as charged in the indictment." The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him to which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment: That whereas the said DAVID SANDSTROM having been duly convicted in the Court of the crime of DELIBERATE HOMICIDE

It is Therefore, Ordered, Adjudged and Decreed, That the said DAVID SANDSTROM be punished by imprisonment in the Penitentiary of the State of Montana, for the term of 100 years at hard labor, and that a civil judgment be entered against the said DAVID SANDSTROM for the costs of this prosecution.

The defendant was then remanded to the custody of the Sheriff of the said County of DEER LODGE to be by him delivered into the custody of the proper officers of said Penitentiary.

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF MONTANA
IN AND FOR THE COUNTY OF DEER LODGE

The State of Montana, To the Sheriff of the County of DEER LODGE, State of Montana, and the Warden and Officers in charge of the Penitentiary of the

State of Montana—GREETING:

Whereas, DAVID SANDSTROM, having been duly convicted in our District Court of the THIRD Judicial District of the State of Montana, in and for the County of DEER LODGE of the crime of DELIBERATE HOMICIDE and judgment having been pronounced against him that he be punished by imprisonment in the Penitentiary of the State of Montana, for the term of 100 years consecutively all of which appearing to us of record, and a certified copy of the judgment being endorsed herein and made a part hereof:

Now, This is to Command You, the Sheriff of the County of DEER LODGE to take and keep and safely deliver the said DAVID SANDSTROM into the custody of the said Warden, or other Officer in charge of the said Penitentiary, at your earliest convenience.

And This is to Command You, the said Warden and other officers in charge of the Penitentiary of the State of Montana, aforesaid, to receive of and from the Sheriff of the County of DEER LODGE the said DAVID SANDSTROM convicted and sentenced as aforesaid, and HE the said DAVID SANDSTROM keep and imprison in the said Penitentiary for the State of Montana, for the term of 100 years.

And these presents shall be your authority for the same. Herein fail not.

Witness: Hon. ROBERT J. BOYD, Judge of the said District Court, at the Court House in ANACONDA in

the County of DEER LODGE this 26th day of July, A.D. 1977.

Attest:

My hand and the seal of said Court, the day and year last above written.

/s/ Helen Meloy
Clerk

/s/ By Angela Kieser
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF MONTANA

1978

No. 14064

STATE OF MONTANA, PLAINTIFF AND RESPONDENT

—*vs.*—

DAVID SANDSTROM, DEFENDANT AND APPELLANT

Appeal from: District Court of the Third Judicial District, Honorable Robert J. Boyd, Judge presiding.

Counsel of Record:

For Appellant:

Byron Boggs argued, Anaconda, Montana

For Respondent:

Hon. Mike Greely, Attorney General, Helena, Montana
John Radonich argued, County Attorney, Anaconda, Montana

Submitted: May 3, 1978

Decided: June 8, 1978

Mr. Justice John Conway Harrison delivered the Opinion of the Court.

On November 1, 1976, Mrs. Annie Jessen, 89 years of age, was found dead in her home in Anaconda, Montana, the apparent victim of a brutal assault in which

she received blows to her head from a shovel, and five stab wounds to her back from a kitchen knife. Mrs. Jessen had, in addition, been sexually assaulted and received a compound fracture to her leg, apparently after the slaying.

On November 22, 1976, defendant, 18 years of age, was arrested for an unrelated crime. Shortly thereafter, and while in custody of the Deer Lodge County sheriff, defendant confessed to the slaying of Mrs. Jessen. The confession was subsequently corroborated by certain physical evidence.

Based upon the confession and supporting evidence, defendant was charged, by an Information filed December 2, 1976, with the crime of deliberate homicide, in violation of section 94-5-102, R.C.M. 1947.

At the arraignment on the charge, defendant entered a plea of "not guilty" and filed a notice of intent to rely on mental disease or defect excluding criminal responsibility, as a defense.

Defense counsel subsequently moved for a change of venue, based upon allegedly prejudicial pretrial publicity. The motion was heard on July 6, 1977 in the District Court, Deer Lodge County. Defendant presented the testimony of four witnesses. Three of the four witnesses testified that, despite their perception that many Anaconda areas residents had formed some opinion concerning the case, the defendant could receive a fair trial in Deer Lodge County. The fourth witness, Oscar Sandstrom, the father of defendant, testified primarily concerning abusive phone calls he had received following his son's arrest. The motion was denied with leave to renew at the time of jury selection.

The trial on the charge commenced on July 18, 1977. Defendant's renewed motion for change of venue was denied. Defendant further moved that the jurors be examined in voir dire individually and in segregation, which motion was also denied. Following voir dire, defendant again renewed his motion for change of venue. The motion was again denied.

In his opening statement, defense counsel informed the jury that defendant no longer intended to rely on

the defense of mental disease or defect. The decision to so inform the jury appears to have been based on the reports of two psychiatrists who had examined defendant and determined he was able to appreciate the consequences of his actions, despite his low intelligence level and aggressive/impulsive personality.

The case-in-chief for the state consisted of defendant's confession, together with the corroborating physical and circumstantial evidence. Defendant called as witnesses the two psychiatrists who had examined defendant prior to trial. The witnesses testified that, while defendant may not have had the specific intent to kill at the time of the offense, it was their opinion that he had the intent to "silence" Mrs. Jessen, and was conscious of his activity in bringing about the result.

Following the reception of evidence and upon their deliberations, the jury returned a verdict convicting defendant of the crime as charged. Defendant was subsequently sentenced to 100 years imprisonment in the Montana State Prison.

Defendant appeals the judgment of conviction, entered upon the verdict of the jury.

Defendant raises two issues for review: (1) Did the District Court abuse its discretion in denying defendant's motions for change of venue? and (2) Did the District Court err in giving court's instruction No. 5?

Defendant first argues that the District court abused its discretion in denying his three motions for change of venue on the grounds an impartial trial could not be afforded defendant in Deer Lodge County. It is maintained the pretrial publicity, given the nature of the crime in this case, rendered selection of an impartial jury impossible.

The applicable statute in this regard, section 95-1710 (a), R.C.M. 1947, states:

> "The defendant * * * may move for a change of place of trial on the grounds that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county."

Accordingly, it is well settled that granting a change of venue in a criminal trial is within the sound discretion of the trial court, and the denial of a motion for change of venue will only be reversed upon a showing of an abuse of discretion. State ex rel. Hanrahan v. District Court, (1965), 145 Mont. 501, 401 P.2d 770; State v. Corliss, (1967), 150 Mont. 40, 430 P.2d, 632; State v. Olson, (1971), 156 Mont. 339, 480 P.2d 822.

It has been held that mere publication of a news story dealing with the facts and circumstances of the crime is not a sufficient basis for change of venue. Published accounts of crimes are not considered prejudicial unless so passionate as to excite undue prejudice, rendering it impossible to empanel a trial jury free from prejudice against the defendant. State ex rel. Hanrahan v. District Court, supra; State v. Corliss, supra.

Defendant relies on Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1938), and State v. Dryman, (1954), 127 Mont. 579, 269 P.2d 796, as authority for reversing a conviction in which change of venue had been denied, despite adverse pretrial publicity. The cases, however, are clearly distinguishable on the basis of the volume and content of the publicity.

Here, the publicity under consideration consists of 17 newspaper articles concerning various aspects of the crime, the investigation, and the subsequent arrest of defendant. Two of the articles, published after defendant's arrest, contain a picture of defendant in police custody.

Considering the nature of the crime involved, we find the reporting extremely objective and factual. Further, we do not consider the amount of publicity given to the crime and ensuing events in this case to be unreasonably voluminous. We conclude that there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue.

It is significant to note that the witnesses at the hearing on defendant's initial motion for change of venue, with the sole exception of defendant's father, testified they believed defendant would receive a fair trial in Deer

Lodge County, despite the pretrial publicity and existence of some measure of adverse public opinion.

Further, while certain of the twelve empaneled jurors had read or heard something regarding the crime, there exists no requirement that jurors be totally ignorant of the facts involved in the case before them. It is sufficient if the juror can lay aside any impressions or opinions and render a verdict based upon the evidence presented at the trial. State v. Moran, (1963), 142 Mont. 423, 384 P.2d 777; State v. Simpson, (1939), 109 Mont. 198, 95 P.2d 761.

Defendant next contends the District Court erred in giving court's instruction No. 5 to the jury. Instruction No. 5 states:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The given instruction paraphrases the language of section 93-1301-7(3), R.C.M. 1947, giving rise to the rebuttal presumption.

Defendant, in essence, contends the given instruction shifts to a defendant the burden of disproving an element of the crime charged, i.e. intent. It is maintained the state is thus relieved from proving an essential element of the crime charged, contrary to recent pronouncements of the United States Supreme Court. In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L Ed 2d 368; Mullaney v. Wilbur, (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L Ed 2d 508; Patterson v. New York, (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L Ed 2d 281.

The recent decisions relied on by defendant generally prohibit, under the auspices of the due process clause, shifting to a defendant, such as by presumption, the burden of proof regarding an essential element of the offense, most typically the element of criminal intent. In re Winship, supra; Mullaney v. Wilbur, supra; Patterson v. New York, supra. However, such cases do not prohibit allocation of *some* burden of proof to a defendant under certain circumstances. Rather, the concern expressed in such cases is that the State prove every element of the offense charged as that offense is defined

by state law. State v. McKenzie, (No. 13011, Decided June 7, 1978).

Moreover, an instruction similar in effect to that under consideration here has received recent consideration and approval by this Court in State v. Coleman, —— Mont. ——, —— P.2d ——, 35 St.Rep. 560. In fact, the very instruction was approved by this Court in State v. McKenzie, supra, by the following language:

> "The presumptions that an unlawful act was done with unlawful intent, and that a person intends the ordinary consequences of his voluntary act, have been a part of Montana law since 1895. This Court has previously approved the use of these presumptions in criminal cases on the issue of intent. State v. Caryl, (1975), 168 Mont. 414, 426, 543 P.2d 389; State v. McLeod, (1957), 131 Mont. 478, 489, 311 P.2d 400, 407. See also State v. Jones, (1963), 143 Mont. 155, 181, 387 P.2d 913. The conclusions drawn through the use of these presumptions are generally fair and reasonable ways to ascertain intent which, of course, can never be proved directly * * *." —— St.Rep. ——.

A review of the transcript of the trial in this case demonstrates that the State satisfied its burden of proof of each of the elements of the offense charged, including the element of intent. Defendant's sole burden under instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts, not to disprove that he acted "purposely" or "knowingly". We hold the instruction does not violate due process standards as defined by the United States or Montana Constitution, and as interpreted by relevant case authority, and therefore does not constitute reversible error.

The conviction of defendant is affirmed.

/s/ John Conway Harrison
Justice

We concur:

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ Daniel J. Shea

/s/ John C. Shuhey
Justices

IN THE SUPREME COURT OF THE
STATE OF MONTANA

14064

D.C. #2877

March Term A.D. 1978

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Third Judicial District, in and for the County of Deer Lodge, Greeting:

WHEREAS, In the said District Court in a cause between State of Montana Plaintiff and Respondent and David Sandstrom Defendant and Appellant wherein the Judgment of the said District Court, entered in said cause on the 11th day of August A.D. 1977 was in favor of the said Plaintiff and Respondent and against the said Defendant and Appellant as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statue of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the March term of court in the year of our Lord, one thousand nine hundred and seventy-eight said cause came on to be heard before said Supreme Court and was argued by counsel.

WHEREAS, On consideration, it is now here ordered and adjudged by this Court that the Judgment of the Court below, entered in this cause on the 11th day of August A.D. 1977 is affirmed.

Costs in this Court:

Appellant	Appearance	— $ none
Respondent	Appearance	— $ none
Remittitur	.....	— $ none

June 8 A.D. 1978

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable Frank I. Haswell Chief Justice of the Supreme Court of the State of Montana, this 29th day of June A.D. 1978.

/s/ Richard T. Conboy
Deputy Clerk of the
Supreme Court of the
State of Montana

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 14064

STATE OF MONTANA, PLAINTIFF AND RESPONDENT

vs.

DAVID SANDSTROM, DEFENDANT AND APPELLANT

ORDER

PER CURIAM:

Appellant's petition for rehearing in the above named cause having been filed, and the same considered by this Court,

IT IS HEREBY ORDERED that the petition for rehearing in the above named cause is denied.

DATED this 28th day of June, 1978

/s/ Frank I. Haswell
Chief Justice

/s/ Gene B. Daly

/s/ John Conway Harrison

/s/ John C. Shuhey
Justices

SUPREME COURT OF THE UNITED STATES

No. 78-5384

DAVID SANDSTROM, PETITIONER

v.

MONTANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Montana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 8, 1979

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